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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, *Appellant*,

v.

WILLIAM G. CONNELIE, ET AL., *Appellees*.

On Appeal From the United States District Court for the Southern District of Texas

MOTION AND BRIEF ON BEHALF OF AMICI CURIAE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

The Mexican American Legal Defense and Educational Fund and the Asian Law Caucus hereby move the Court, pursuant to Rule 42(3) of its Rules of Practice, for leave to file the attached brief as amici curiae in support of reversal of the judgment below. This motion and the attached brief are timely filed within the time allowed for filing of Appellant's brief on the merits. Appellant has

given his consent to the filing of this brief by letter from counsel which has been filed with this Court. Appellee has declined to consent to this filing. In support of this motion, we rely on the following:

1. Interest of Amici Curiae.

The Mexican American Legal Defense and Educational Fund was founded in 1968 as a non-profit corporation under the laws of the State of Texas. The headquarters of the organization are now located in San Francisco, California with additional offices in San Antonio, Texas, Los Angeles, California, Denver, Colorado, and Washington, D.C. MALDEF's primary purpose is to secure the civil rights of persons of Mexican descent through litigation and education.

In its efforts to assist its client community to achieve their rights under law, MALDEF has handled litigation challenging the traditional barriers faced by persons of Mexican descent including discrimination in employment. MALDEF is particularly concerned about the effects of non-job-related hiring criteria which limit employment opportunities for its client community and is intimately familiar with the hardships caused to Mexican Americans by exclusionary policies of employees.

MALDEF has been particularly concerned with governmental practices which operate to deny public employment opportunities to Mexican Americans. We have, therefore, participated amicus curiae before this Court in Hampton v. Mow Sun Wong, October Term, 1973, No. 73-1596, 48 L.Ed.2d 495 (1976). MALDEF has also litigated a substantial number of public employment discrimination cases in the lower federal courts; some of these, like Chicano Police Officers' Ass'n. v. Stover, 526 F.2d 431 (10th Cir. 1975), vacated for further consideration 49 L.Ed.2d 1181 (1976), involve police jobs similar to those at stake in the instant appeal.

The Asian Law Caucus is a non-profit, legal service and education organization dedicated to serving the legal needs of the San Francisco Bay Area Asian communities. Founded in 1972, the Caucus operates offices in Oakland and San Francisco and is in close communication with other Asian legal service groups such as the Asian American Legal Defense and Education Fund in New York City. A critical concern of the Caucus has been protection of the legal rights of Asian immigrants. Largely in response to the geometric increases of the Asian immigrant population, our efforts

concentrate heavily upon the development of legal information and workshops.

In relationship to alien Asians a significant issue area has emerged in the field of employment discrimination law. The Caucus is deeply aware of the profound consequences of institutionalization of discriminatory employment practices. No doubt these consequences affect all minority groups; however, discriminatory employment practices based upon alienage or race have an especially critical impact upon Asians, given the over 600% increase in legal Asian immigration since 1975. For this reason, the Asian Law Caucus has often participated in employment discrimination suits including Hampton v. Mow Sun Wong, supra, and Salazar, et al. v. California Blue Shield, C.A. No. 73-1081 CBR (N.D. Cal. 1973).

2. Facts and Questions That May Not Be Fully Presented by the Parties.

The largest group of aliens in the United States is Spanish-surnamed. MALDEF's client group includes the approximately six million Mexican American citizens and permanent resident aliens. Through representation of Mexican American individuals and classes we have learned much about the particular problems of

employment discrimination which confront them, and persons of Hispanic origin generally. We find that while the civil rights problems of Mexican Americans and other Hispanics have much in common with those of other minority groups, ours are also in many respects distinct. We offer our views on the issues presented by the instant case, therefore, from a civil rights perspective. We note the dearth of Mexican American and Hispanic police officers nationwide and in states of high resident alien population (most of it Hispanic), including those states adjacent to the Mexican border. Asian-American citizens and permanent resident aliens number over two million. Such aliens are concentrated in the large industrial states of New York, California and Illinois. The facts and questions we discuss may well differ from those briefed by Appellant, an Irish-American. Mr. Foley is, after all, a member of a national origin group which is not ordinarily considered the object of national origin discrimination except that based on alienage, and which is in many places, including New York, at least adequately represented on local police forces.

The foregoing considerations are relevant to disposition of the case. In determining

the constitutionality of New York Executive Law § 215(3), the Court must consider that that statute discriminates not only against all aliens as a group, but also against certain national origin categories of aliens who are, and have long been, the particular objects of discriminatory laws and practices akin to those of racial discrimination, cf. Castaneda v. Partida, 51 L.Ed.2d 498, 511 (1977). This Court should also consider, in deciding the case, the inhibiting effect that statutes like New York's have on achievement of the desirable goal that state and local police forces should more accurately reflect the background of the populations they serve and control, as we discuss in our brief.

3. Conclusion.

For the reasons stated above, the Mexican American Legal Defense and Educational Fund and the Asian Law Caucus move that the Court grant them leave to file their brief as amici curiae.

Respectfully submitted,

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Eisenberg, et al., Police Personnel Practices in State and Local Governments, International Ass'n of Chiefs of Police and Police Foundation, Washington, D.C. (1973).....10

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U.S. Advisory Commission on Criminal Justice Standards and Goals, Police (Washington, D.C. 1973).....10

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U.S. Department of Justice, 1975 Annual Report: Immigration and Naturalization Service, "Aliens Who Reported Under the Alien Address Program by Selected Nationalities and State of Residence", Washington: U.S. Gov. Printing Office (1975).....5

IN THE

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BRIEF ON BEHALF OF AMICI CURIAE

Mexican American Legal Defense and Educational Fund

and

Asian Law Caucus

STATEMENT

A. The Issue Presented Here.

Amici curiae adopt the Statement of the Case presented in Appellant's Brief. We add to that Statement only a few points pertinent to our own perspective.

In upholding the validity of New York Executive Law § 215(3), which requires that members of the state police force be United States citizens, the District Court applied an equal protection standard less stringent than "strict scrutiny". In determining the proper test to be applied in this case, the District Court reviewed this Court's decisions in Graham v. Richardson, 403 U.S. 365 (1971), and four recent cases involving governmental limitations on employment rights of aliens: Sugarman v. Dougall, 413 U.S. 634 (1973); In Re Griffiths, 413 U.S. 717 (1973); Hampton v. Mow Sun Wong, 426 U.S. 88 (1976) and Examining Board v. Flores de Otero, 49 L.Ed. 2d 65 (1976), and correctly determined that this Court has applied strict scrutiny to classifications based on alienage. 419 F. Supp. at 894. However, the District Court then focused upon dictum in Sugarman, supra, which suggested recognition of a state's interest in defining its political community and limiting participation in state government to those who are within that political community. The District Court read this dictum as establishing an exception to the application of strict scrutiny where "the state is dealing with democratic government and its

participants." Id. at 895. Thereupon the District Court avoided following the precedent of this Court's four alien employment cases by declaring the position of state trooper to be such an important part of state government as to fall within the "democratic government" exception delineated in Sugarman. Id. at 895. The court below found the duties of the state police to be "awesome responsibilities" justifying departure from previous alien employment decisions, id. at 896.

The issue presented here is thus whether the position of state police officer is so sensitive and so directly involved in state government as to remove it from the categories of common occupations in the community, to which aliens are guaranteed access by the equal protection clause of the Fourteenth Amendment. Determination of this issue will involve consideration of both the proper equal protection standard to be applied, and the nature of state police positions. In making these determinations, this Court should be conscious of the magnitude of the impact of the exclusionary policy exemplified by the New York statute.

B. The Issue Presented Has Far-Reaching Consequences for Citizens and Non-Citizens Alike.

1. The United States Has a Tradition of Welcoming Immigrants And a Policy of Providing Employment Opportunities to Them.

The United States has always been a nation of immigrants and still remains so. As stated by this Court in In Re Griffiths, supra, 413 U.S. at 717, "[F]rom its inception, our Nation welcomed and drew strength from the immigration of aliens." It holds the promise of opportunity and justice to the poor, the persecuted and the adventurous of all nations. Consistent with this promise has been protection of the alien's right to work in the common occupations of the community as guaranteed by the equal protection clause of the Fourteenth Amendment. See Truax v. Raich, 239 U.S. 33 (1915); Yick Wo v. Hopkins, 118 U.S. 356 (1886). This basic freedom not only continues to be protected but has been expanded in recent years to restrict the powers of the states to discriminate with respect to employment opportunities against non-citizens. See, Sugarman v. Dougall, supra, In Re Griffiths, supra, and Examining Board v. Flores de Otero, supra. The issue presented here should be decided consistent with this country's long tradition of offering immigrants the opportunity to live and work in the communities of the nation free

from discrimination by the laws to which they too are equally subject.

2. Large Numbers of Permanent Resident Aliens Are Precluded From Employment By Exclusionary Statutes.

Amici curiae submit this brief in order to call this Court's attention to the importance of the issue involved in this case and the impact of its decision on United States alien residents, particularly those of Mexican and Asian descent, and on the provision of effective law enforcement to language minority communities. The latest available U.S. Immigration and Naturalization Service figures show that there were 4,225,725 permanent resident aliens living in the United States in 1975.[1] Of that number 868,198—the largest single group—were from Mexico; 459,393 were from China, Japan, Korea, or the Phillipines.[2] Amicus MALDEF's interest in the impact of this case on Mexican resident aliens is highlighted

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1. U.S. Department of Justice, 1975 Annual Report: Immigration and Naturalization Service, Table 35: "Aliens Who Reported Under the Alien Address Program by Selected Nationalities and State of Residence", p. 112. Washington: U.S. Gov. Printing Off. (1975) [hereinafter cited as "1975 INS Annual Report"]

2. Id.

by the fact that although 1,138,349 persons were naturalized between 1966 and 1975, only 57,866 were from Mexico.[3] Thus, while Mexicans constituted 20.5% of the permanent resident alien population of the United States in 1975, they comprised only 5% of the persons naturalized over the previous nine years. Possible reasons for such an apparent lag in the naturalization rate of Mexican aliens include past and present discrimination, isolation of Mexican and Mexican American communities, and their exclusion from the mainstream of American life. The fact remains, however, that there are a large number of Mexican aliens lawfully residing in the United States and they apparently have a low naturalization rate.

3. Citizenship is Presently Required by the Vast Majority of Law Enforcement Agencies.

Citizenship requirements are prevalent among state and local police departments. In a survey conducted in 1973 by the International Association of Chiefs of Police in conjunction with the Police Foundation, 94% of the state and local police departments surveyed required

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3. Id., Table 39, "Persons By County or Region of Former Allegiance Years Ended June 30, 1966-1976", p. 117.

U.S. citizenship for male sworn personnel.[4] Our research reveals that 24 states presently have statutes that require U.S. citizenship for members of the state police.[5] All nine of the states in which more than 100,000 aliens reside have citizenship requirements for police officers.[6] To these states must be added those

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4. Eisenberg, et al., Police Personnel Practices in State and Local Governments, International Ass'n. of Chiefs of Police and Police Foundation, Washington, D.C. (1973), p. 22.

5. The following statutes require U.S. citizenship for state police positions: Ariz. Rev. Stat. Ann. § 38-201 (but see Atty. Gen. Opinion 73-19 holding this section invalid); Cal. Gov. Code § 1031(a) (but see Chavez-Salido v. Cabell, 427 F. Supp. 158 [C.D. Cal. 1977]); Fla. Stat. Ann. § 943.13(2); Ga. Code Ann. § 92A-214; Ill. Rev. Stat. Ch. 121 § 307.9; Iowa Code Ann. § 30.15; Kan. Stat. Ann. § 74-2113; Ky. Rev. Stat. Ann. § 16.040(2)(c); Mass. Gen. Laws Ch. 31 § 12; Mich. Stat. Ann. § 28.4; Miss. Code. Ann. § 45-3-9; Mo. Rev. Stat. § 43.060; Mont. Rev. Codes Ann. § 31-105(3)(a)(v); Nev. Rev. Stat. § 281.060(i); N.H. Rev. Stat. Ann. § 106-B:20; N.J. Rev. Stat. 53:1-9; N.M. Stat. Ann. § 39-2-6; N.Y. Exec. Law § 215(3); N.D. Cent. Code § 39-03-04(4); Or. Rev. Stat. § 181-260 (1)(a); Pa. Stat. Ann. Tit. 71 § 1193; R.I. Gen. Laws Ann. § 42-28-10; Tex. Rev. Civ. Stat. Ann. Art. 4413(9)(2); Utah Code Ann. § 27-11-11. In addition Indiana requires citizenship by regulations: Ind. Adm. Rules and Regs. (10-1-1-4)-7.

6. 1975 INS Annual Report, p. 112. The following figures were taken from Table 35, supra n. 1 (see next p.)

municipalities and other local governments, probably innumerable, which similarly restrict or bar the employment of aliens as police officers.[7] The number of permanent resident aliens living in these nine states totals 3,272,020. Employment as police officers is foreclosed to this large number of aliens by statutes similar to the one challenged here.

Each of the four Southwestern border states and Illinois, where most Mexican resident aliens settle, excludes non-citizens from serving as police officers.[8] The opportunity

State	Total Aliens	Perm. Resid. Aliens
California	1,129,706	1,058,991
New York	794,508	728,526
Florida	371,114	302,770
Texas	327,668	306,383
New Jersey	269,379	235,249
Illinois	286,581	255,540
Massachussetts	176,955	162,332
Michigan	140,311	126,769
Pennsylvania	107,781	95,460

7. This category would include both local units that independently enforce a state law or practice, see Chavez-Salido v. Cabell, supra, n. 6.; and those that have their own exclusionary ordinances, see Mohamed v. Parks, 352 F. Supp. 578 (D. Mass. 1973).

8. 1975 INS Annual Report, p. 112. The following figures were taken from Table 35, supra, n. 1: (see next page)

to serve as police officers is thus denied to 804,763 Mexican aliens in those states which have the largest Spanish speaking populations which must be served by state and local police departments. The same situation is true for Asians. In California and New York, the two states with the largest Asian alien populations, containing 161,146 and 56,811 aliens of Chinese, Japanese, Korean and Philipino origin respectively,[9] U.S. citizenship is required for state police positions.

4. Law Enforcement Services in Minority Communities Are Adversely Affected By Police Department Citizenship Requirements Which Exclude Aliens of National Origin Minorities.

Amici's concern is not limited to the thousands of prospective police officers who will be affected by this decision. Of equal importance is the impact which exclusionary rules have on the millions of language minority

State	Aliens	Perm. Res. Aliens	Aliens from Mexico
Calif.	1,129,706	1,058,991	459,528
Texas	327,668	306,383	235,808
Ill.	286,581	255,540	60,863
Ariz.	60,143	56,251	37,946
New Mex.	17,291	16,084	10,618

9. Id., p. 112.

citizens and non-citizens, particularly Mexican American and Mexican and Asian, who are served by law enforcement agencies across the country. Increased emphasis has rightly been placed on minority recruitment and on the goal that police agencies should be representative of the population they serve.[10] Employment of minority police officers is seen as a "realistic means for improving the modern police agency's capability to provide an effective range of services."[11] Yet one major source of national origin minorities—permanent resident aliens—is being systematically excluded from consideration.

Language minorities are seriously underrepresented on police forces. Statistics compiled by the Race Relations Information Center in 1974 indicate that only 3.1% of state police officers of the 42 states responding to its survey were members of minority groups.[12] The

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10. See, U.S. Advisory Commission on Criminal Justice Standards and Goals, Police (Washington, D.C. 1973), and California Attorney General's Advisory Commission on Community Police Relations, The Police in the California Community (1973).

11. California Attorney General's Advisory Commission, supra, p. 11-2.

12. Egerton, "A National Survey of Minority Policemen: How Many Are There?", 5 Race Relations Reporter No. 21 (Nov. 1974).

data further indicated that there were only 511 Hispanic officers, comprising only 1.2% of the total of 41,894 sworn personnel.[13] The paucity of Asian state police officers is even more striking: out of those 41,894 sworn personnel referred to above, only 7 were Asians.[14] None of these Asian officers were from New York. Data from several states of large Mexican-American population are representative of the statistics for Mexican Americans. California, where Spanish-surnamed persons make up 12.9%[15] of the state's population, has been unsuccessful in hiring highway patrolmen who reflect the populations which they serve. Spanish/Mexican-American officers comprised only 3.26% of the force in 1974.[16] Texas has a Spanish-surnamed population of 1,195,416, or 14.9% of

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13. Id., p. 19.

14. Id.

15. U.S. Bureau of the Census, 1970 Census of Population: Spanish Ancestry, Washington 1973, Table B. [hereinafter cited as "1970 Census: Spanish Ancestry"]

16. International Association of Chiefs of Police, Comparative Data Report 1974, p. 218. [hereinafter cited as "IACP Comparative Data Report"]

the total population of the state.[17] In addition, the state receives hundreds of thousands of Mexican tourists annually.[18] Yet, the Texas Highway Patrol reported in 1974 that only 3.95% of its officers were Spanish/Mexican-American.[19] Illinois had no Spanish/Mexican-American state police officers, nor were there likely to be any by 1976.[20] In addition to having large Mexican-American populations, each of these states has a large Mexican alien population. These states, and others, have foreclosed a potential source of Spanish-speaking police personnel by denying employment opportunities to permanent resident aliens. This disproportionately low number of Mexican-American and Spanish speaking state police contributed to the continued neglect of communities which have traditionally been underserved. Such data tend to serve to confirm minority group perceptions that the service they receive is of poorer quality than that provided to the majority community.[21]

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17. 1970 Census: Spanish Ancestry, Table B.

18. Of a total of 1,586,999 temporary visitors from Mexico admitted at land border ports, 644,482 entered through Texas. 1975 INS Annual Report, p. 181.

19. IACP Comparative Data Report, p. 218.

20. Id., p. 218

21. Cal. Att'y. Gen. Adv. Comm., supra n. 10, p 11-4.

The United States Commission on Civil Rights issued a report in 1970 which found evidence that Mexican-Americans in the Southwest were victims of widespread discrimination by law enforcement officials.[22] The double standard of treatment was found to alienate Mexican Americans from police officials. Although language difficulties were found to handicap many Mexican-Americans in their contacts with law enforcement officials, the Commission found that few agencies had made any effort to provide instructions in conversational Spanish to their officers.[23] Employment of Mexican-Americans by law enforcement agencies was found not to reflect the population of the areas served and this failure to maintain a representative staff was cited as a factor in poor police-community relations and problems in law enforcement.[24] Officers from minority communities bring to law enforcement agencies knowledge of their neighborhoods, their culture, and their language which white Anglo officers may have difficulty understanding. A higher minority representation on police forces seems to be the logical

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22. U.S. Commission on Civil Rights, Mexican-Americans and the Administration of Justice in the Southwest: Summary, Washington 1970, p. 2.

23. Id., p. 12.

24. Id., p. 17.

solution to strained relations between minority communities and the police.[25] In fact, a public opinion poll conducted in California indicated that only 22% of the people surveyed believe that enough minority group officers are assigned to minority neighborhoods.[26] The problems posed by differential police treatment of Mexican-Americans, whether real or perceived, can be alleviated by recruiting qualified persons from an as yet untapped source—the large population of permanent resident aliens of Mexican origin.

The ramifications of this case apply equally to Asians. The Asian population is growing rapidly each year, being bolstered by a large influx of immigrants. Between the years of 1970 and 1973, 390,477 Asians immigrated to the United States.[27] A substantial proportion of the Asian population is non-English speaking or of limited English-speaking ability. The problems faced by these immigrants

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25. Id., p. 13.

26. Cal. Att'y. Gen. Adv. Comm., supra n. 10, p. 11-4.

27. U.S. Dept. of Health, Education, and Welfare, Office of Special Concerns, Office of Asian-American Affairs, "A Summary of Asian American Health, Education and Welfare Problems", Tables A,B.

and other language minorities has become universally recognized over the past decade. See, e.g., Lau v. Nichols, 414 U.S. 563 (1973).

Problems in police relations with Asian communities have intensified in metropolital areas where there have been a significant influx of immigrants. See Chan v. Scott, C.A. No. C-72-2049 CBR (N.D. Cal. 1972), and Wong v. Younger, C.A. No. C-73-2050 LHB (N.D. Cal. 1973). No doubt such strained relations can be mitigated by an increase in Asian representation in police departments, especially of those Asians who are bilingual and bicultural. A large potential pool of qualified Asian aliens to fill these needs remains untapped.

ARGUMENT

I. THIS CASE IS CONTROLLED BY PRIOR DECISIONS REQUIRING INVALIDATION OF NEW YORK'S EXCLUSIONARY STATUTE.

A. The Issue Framed for This Case by Prior Decisions of This Court.

In recent years this Court has handed down a quartet of harmonious decisions in cases involving official restrictions on alien employment rights. Sugarman v. Dougall, 413 U.S. 634 (1973); In Re Griffiths, 413 U.S. 717 (1973); Examining Board v. Flores de Otero, 49 L.Ed.2d 65 (1976); Hampton v. Mow Sun Wong, 48 L.Ed.2d 495 (1976). The principles established by those decisions clearly frame the issue presented here. Those decisions struck down restrictions on alien employment in a number of positions—the state competitive civil service generally (Sugarman), the federal competitive civil service generally (Hampton), lawyers (In Re Griffiths), and civil engineers (Flores de Otero). Consistent lower court decisions that followed or correctly anticipated this Court's rulings have applied the same reasoning to invalidate similar restrictions affecting a wide variety of positions.[28]

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28. See, e.g., Satoskar v. Indiana Real Estate

To trace here the reasoning of this Court in its recent decisions would be superfluous. We simply note three broad principles defini-

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Commission, __F. Supp. __ (S.D. Ind. 1973), aff'd. 417 U.S. 983 (1974) (real estate salespersons); Mendoza v. City of Miami, 483 F.2d 430 (5th Cir. 1973) (municipal civil service positions generally); Chavez-Salido v. Cabell, 427 F. Supp. 158 (C.D. Cal. 1977) (three-judge court) (police officers); Taggart v. Mandel, 391 F. Supp. 732 (D. Md. 1975) (three-judge court(notaries public); Surmeli v. State of New York, 412 F. Supp. 394 (S.D. N.Y. 1976) (physicians); Younus v Shabat, 336 F. Supp. 1137 (N.D. Ill. 1971) (college teachers seeking tenure); Norwick v. Nyquist, 417 F. Supp. 913 (S.D. N.Y. 1976) (public school teachers); C.D.R. Enterprises, Ltd. v. Board of Education, 412 F. Supp. 1164 (E.D. N.Y. 1976) (three-judge court), aff'd. 50 L.Ed.2d 742 (1977) (public contractors' employees); Miranda v. Nelson, 351 F. Supp. 735 (D. Ariz. 1972), aff'd 413 U.S. 902 (1973) (state civil service jobs generally); Teitscheid v. Leopold, 342 F. Supp. 299 (D. Vt. 1972) (state employment generally); Mohamed v. Parks, 352 F. Supp. 518 (D. Mass. 1973) (municipal employment generally); Wong v. Hohnstrom, 405 F. Supp. 727 (D. Minn. 1975) (pharmacists); Ramos v. United States Civil Service Commission, 376 F. Supp. 361 (D. P.R. 1974) (federal employment generally and federal farm disaster loan eligibility). Cf. Maudet v. Nyquist, 406 F. Supp. 1223 (W.D. N.Y. 1976) (three-judge court) (student financial aid applicants); Lopez v. Butz, 535 F.2d 1170 (9th Cir. 1976) (farm operating loan eligibility); Soni v. Board of Trustees of Univ. of Tennessee, 513 F.2d 347, 350 n. 1 (6th Cir. 1975) (university educators). See also, Purdy v. Fitzpatrick, 456 P.2d 645 (Cal. 1969) (public works jobs).

tively established by those decisions. First, restrictions on the right of permanent resident aliens to seek employment with or controlled by government must be searchingly reviewed under the equal protection standard of strict scrutiny. Sugarman, supra, 413 U.S. at 642; In Re Griffiths, supra, 413 U.S. at 721; Flores de Otero, supra, 49 L.Ed.2d at 85. These decisions merely apply the long-established principle that aliens are a discrete and insular minority and are particularly the subject of Congressional control, such that state laws separately classifying or restricting them must satisfy a heightened standard of constitutional review, Truax v. Raich, 239 U.S. 410 (1948); Takahashi v. Fish and Game Commission, 334 U.S. 410 (1948); Graham v. Richardson, 403 U.S. 365 (1971).[29] Second, statutes or rules which indiscriminately exclude aliens from broad classes of public employment are constitutionally defec-

29. The District Court held the strict scrutiny test inapplicable, because of the purportedly policy-making nature of police jobs. 419 F. Supp. at 895. It noted, however, that even under that test it was satisfied that the State had borne its burden. Amici do not argue the question of appropriate standards here, for we believe the District Court's error to be a clear one, and in any event one thoroughly discussed in Judge Mansfield's dissenting opinion.

tive, Sugarman, supra, 413 U.S. at 642-3; Flores de Otero, supra, 49 L.Ed.2d at 87, cf. Hampton, supra, 48 L.Ed.2d at 515-6. Third, the only positions for which laws restricting alien employment might be entitled to the usual measure of federal judicial deference to state legislative choices, under a less strict standard of equal protection review, are those within "an appropriately defined class of positions...[consisting of] state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution, or review of broad public policy perform functions that go to the heart of representative government", Sugarman, supra, 413 U.S. at 647. This dictum derives from the Court's brief statement recognizing a state's power "to preserve the basic conception of a political community" by limiting the franchise to its residents, in Dunn v. Blumstein, 405 U.S. 330(1972). Similarly, this Court has struck down a prohibition on aliens' licensing to practice law by noting that an attorney did not occupy a position "so close to the core of the political process as to make him a formulator of government policy", In Re Griffiths, supra, 413 U.S. at 729.

Simply stated, the issue in this case, therefore, is whether state police officers "perform jobs that go to the heart of representative government" because they "participate directly in the formulation, execution, or review of broad public policy". The District Court, relying very heavily on the "political community" notion of Dunn, held that they do, 419 F. Supp. at 895. Only on that basis could it escape the Sugarman holding and the controlling principles of the line of cases to which Sugarman belongs. Amici urge that this strained holding was patently in error, for reasons Judge Mansfield's dissenting opinion below points out. Neither the record in this case nor our common knowledge of what police officers do will countenance the District Court's conclusions.

B. State Police Jobs Are Not So Different In Pertinent Respects As To Require a Result Different From That Of Prior Decisions.

State trooper jobs are not policy-making or political in nature. While troopers and other police officers enforce the law, it is most emphatically not their job to make law (the legislature's task), to formulate policy to implement the law (the executive's task), or

to construe the law (the judiciary's province). The discretion exercised by police officers is not one of policy-making choices; it involves the determination of whether the facts in a particular instance require application of prescribed rules which the officer is obligated to enforce and obey.

The nature of a New York state trooper's usual activities is suggested by the fact that the state police force in 1974 issued 514,000 traffic tickets and made only about one-tenth that many arrests, including the presumably substantial number of arrests made for motorist offenses such as drunk driving (Connelie Aff. ¶ 8, App. D-28). The state police job is not elevated to a position central to representative government. The State seeks to transfrom the nature of police work by stating that police officers perform a governmental function (but so do file clerks in state offices); that they execute "broad public policy" (but so does a state contracts review officer or a housing inspector); and that they carry out a sovereign function (but so does an income tax form aduitor). Notwithstanding these protestations, there is nothing unique about the duties of a police officer for New York State that differentiates his job from thousands of others in

government, in the perspective of the Sugarman dictum. The District Court's apparent view that in selecting state troopers New York "is dealing with democratic government and its participants", 419 F. Supp. at 895, is highly exaggerated. Therefore, nothing warrants an exception to the widely-applied Sugarman rule for the particular position involved here.

This conclusion follows from the analysis of other jobs in other cases. This Court has previously held that attorneys' responsibilities as officers of the Court "hardly involve matters of state policy or acts of such unique responsibility as to entrust them only to citizens", In Re Griffiths, supra, 413 U.S. at 724. District courts have invalidated state-mandated citizenship requirements for notary public positions, even while recognizing them as "important and essential" state constitutional offices, Taggart v. Mandel, supra, n. 28; for peace officer positions (including state highway patrol) which were explicity found not to be a "high policy making office", Chavez-Salido v. Cabell, supra, n. 28; and for public school teachers with recognized responsibility to impart national values, Norwick v. Nyquist, supra, n. 28. It would be incongruous to hold that aliens may not constitutionally be prevented

from holding such responsible public positions as those of lawyer, notary, and teacher, but may be barred from serving as state troopers.

The New York statute here challenged should be subjected to rigorous scrutiny and held invalid under the equal protection clause, on the grounds that state police jobs are not qualitatively different in pertinent respects from those opened to aliens by prior decisions.

II. THE NEW YORK STATUTE VIOLATES PERMANENT RESIDENT ALIENS' RIGHT TO EQUAL PROTECTION.

Even if the Court chooses to examine afresh the New York statute and the state police positions it forecloses to aliens, the result must be the same. The State cannot justify its exclusion of permanent resident aliens by any of the reasons relied on below, nor by any of the arguments the State has made in this or similar cases.

New York State points to no credible evidence in support of its claims about the nature of state police work. The Connelie affidavit is purely conclusory, and contains little information about what state police officers do. Similarly, the State's assertions regarding the deficiencies of aliens lie purely in the realm of speculation. There is no basis in the record

to conclude that aliens generally lack any of the legitimate qualifications for state police officers.

New York State's doubts about the loyalty of permanent resident alien police applicants are as improbable as they are hypothetical. Many permanent resident aliens have resided in this country for long years, and are full participants in our society in all major respects save the electoral process.[30] Others, such as Appellant Foley, may have made a complete committment to this country but remain unable to seek citizenship because of inability to meet the five-years' residency period prerequisite to naturalization. Every federal court that has examined the issue, with the exception of the court below, has rejected the suggestion that aliens' allegiance to this country is necessarily questionable.[31] There is no proof in this case or elsewhere that aliens as a class exhibit lack of allegiance. The State merely speculates that aliens may be presumed insufficiently loyal, and the Court below

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30. Cf. Sugarman, supra, 413 U.S. at 645-6, 648-9; Hampton, supra, 48 L.Ed.2d at 502.

31. Younus v. Shabat, supra, n. 28, 336 F. Supp. at 1140; Taggart v. Mandel, supra, n. 28, 391 F. Supp. at 740; Norwick v. Nyquist, supra, n. 28, 417 F. Supp. at 921-22.

adopted the suggestion, 419 F. Supp. at 897 [32] The State's prime example of the dangers of the hypothetical loyalty problem is that state police officers occasionally arrest undocumented aliens. There were 200 such apprehensions in 1974, or one per year for each 16 state police officers. Connelie Aff. ¶ 11, App. D-30. Arrests of aliens constituted 0.4% of all arrests made for felonies, misdemeanors, or offenses (not counting the much more numerous traffic offenses). More importantly, the State's argument is unpersuasive because it requires the assumption, nowhere supported by evidence, that alien state police officers would be any less zealous in pursuit of undocumented alien law violators. Just this Term this Court refused to make a similar assumption in Castaneda v. Partida, 51 L.Ed.2d 498 (1977). There, the Court eschewed the suggestion that the behavior of a minority group official toward others of his own group would be predictably or presumptively favor-

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32. The Court offered no facts to support its conclusions, but only broad and unwarranted assumptions. It approved the state's doubt that aliens would be sufficiently concerned with the state's "self-preservation", would "apply justly the laws of the state and federal government", and would lack the proper "spirit and enthusiasm for the customs and traditions of American life", 419 F. Supp. at 897. The Court found in

able.[33] The State's analogous suggestion here is even more implausible, since even in the hypothetical case of an alien improperly swayed by sympathy for his countrymen, most aliens will be of different nationality groups. We should not presume that an Irish immigrant would refuse to arrest or report, for example, an illegally disembarked Korean seaman.

The other rationales advanced by the State in support of the New York statute's constitutionality are equally meritless. The statute is not valid simply because it has remained on the books for some 60 years. "[N]o one acquires a vested right in violation of the Constitution by long use...", Walz v. Tax Commission, 397 U.S. 664, 678 (1970); see also Hampton v. Mow Sun Wong, supra, and Taggart v. Mandel, supra, 391 F. Supp. at 740. The widespread adoption of similar rules, see opinion

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these unsupported speculations a "compelling interest" to bar all aliens.

33. Mr. Justice Marshall, concurring, wrote:

> ...this Court has a solemn responsibility to avoid basing its decisions on broad generalizations concerning minority groups. If history has taught us anything, it is the danger of relying on such stereotypes.

51 L.Ed.2d at 516.

below, 419 F. Supp. at 897 nn. 13,14, is equally irrelevant to the constitution issue, Taggart v. Mandel, supra.[34] And while knowledge of and familiarity with the language and customs of our country might well be a legitimate concern of the State, nothing in the exclusion of aliens is directed at that specific factor, which would obviously be a difficulty for some aliens but inapplicable to many others.[35] Therefore, a more specific inquiry must replace the flat ban on aliens. Taggart v. Mandel, supra, 391 F. Supp. at 740.

The New York statute is also unconstitutionally overbroad, since it excludes all aliens from all state police jobs without differentiating those fit for some or all positions from those who are unfit. In this aspect, the statute suffers from the same defect as the New York provision invalidated in Sugarman. The statute fails to distinguish

34. As to other state laws, their commonness is merely a reflection of a widespread preference which, if unconstitutional, cannot prevail. As to foreign states' laws, our American law and tradition are considerably different, to our national credit and benefit, see p.4 , supra.

35. The state already tests the language skills and knowledge of the laws of all applicants. Only those who achieve satisfactory ratings are considered further.

between positions held by high-level state police officials who might make policy and their subordinates in the paramilitary organization who simply carry out orders. It also completely excludes all aliens without regard to individual characteristics which might properly show their aptitude for efficient and faithful service. The broad thrust of the statutory exclusion clearly demonstrates that the statute's purpose and effect are not to distinguish a class of persons capable of performing state police jobs from another class who are not. Rather, the statute excludes all members of a class on the basis of a non-job-related characteristic: their alienage. That statutory scheme constitutes an irrebuttable presumption of the same sort that this Court has repeatedly disapproved in cases involving both discriminatory employment practices, Cleveland Board of Education v. La Fleur, 414 U.S. 632, 644-47 (1974); and equal protection claims, Stanley v. Illinois, 405 U.S. 645, 649-58 (1972), and see other cases there cited.

The overbroadness analysis of Sugarman has been applied to statutes which preclude aliens from employment in a specified position, as well as to those excluding aliens from all employment within a jurisdiction. In Norwick

v. Nyquist, supra n. 28, the court invalidated as overbroad a statute excluding aliens from employment as public school teachers, 417 F. Supp. at 921. By a similar analysis, the Court in Chavez-Salido v. Cabell, supra, n.28, held that a statute excluding aliens from "peace officer" jobs was unconstitutionally broad, 427 F. Supp. at 170.

The District Court sought to evade the conclusion required by the overbreadth analysis by finding that it would be impossible to identify which aliens would be of questionable loyalty due to their continuing commitment to another sovereign, 419 F. Supp. at 899. This finding is sheer speculation, and defies logic as well. The state has never attempted to differentiate loyal aliens from disloyal aliens. There is no reason to believe that reaching such a judgment would be any harder than making similar evaluations of citizens—a process the State already carries out for hundreds of applicants annually, under the regular applicant screening process. The State has always found its present screening procedures adequate for this purpose and there is no reason to think that the inclusion of some non-citizens in the screening process would necessitate different or additional tests. This Court must

reject the District Court's conclusion that the New York statutory scheme is as precisely drawn as the State interest requires.[36]

There are more reasonable and less discriminatory ways to preserve New York's legitimate interest in maintaining a loyal and efficient police force. These alternatives are preferable because they would lessen the discriminatory impact of the screening process on aliens while emphasizing those qualities which are relevant and necessary to performance of the duties of a state trooper. One alternative would be an appropriately narrow statute. There may be positions within the State Police force which are so central to the functioning of government as to be within the exception noted in Sugarman. The court in Chavez-Salido v. Cabell, supra, specifically stated that its decision should not be read as holding that the state could not require citizenship for the most important peace officers, 427 F. Supp. at 171 n. 24.

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36. Indeed, we do not understand what the "state interest requires" to be the correct test. A statute restricting the equal protection rights of a protected class should be an narrowly drawn as possible. See, e.g., Examining Board v. Flores de Otero, supra, 49 L. Ed.2d at 87-88.

Thus, the state can constitutionally protect its interests by enacting a narrowly drawn statute requiring citizenship for those highly sensitive, decision-making police positions which are properly within the Sugarman exception. As an example, New York might look to a Maine statute, which requires U.S. citizenship for state employees "holding technical or professional positions involving formulation, execution or review of broad public policy..."5 M.R.S.A. § 556. (The statute further provides for waiver of this requirement under certain circumstances.) Such a statute, narrowly drawn to limit its discriminatory effect, would certainly provide an alternative means of insuring effective law enforcement.

Another obvious and appropriate alternative is individualized screening of applicants who pass the qualifying examination with a high rank. Such screening of citizen applicants has long been the rule. To extend the screening process to those alien applicants who also score in the range qualifying them for possible appointment would add little to the State's burden and would in effect remove the class-based presumptions against all aliens from the selection process. At the same time, it would enable the State to ob-

tain the benefits of the services of those aliens who would make good troopers, while removing from consideration those who would not. Although we believe that individual evaluations are the most effective as well as the fairest procedure, another alternative is available. Since the State's concerns with aliens center on questions about their loyalty or allegiance, it could continue to rely on a loyalty oath to all would-be state troopers. It is illogical to assume, as did the Court below, that permanent resident aliens who swear their allegiance to this country's laws and principles would be less trustworthy in enforcing them than would citizens who give no oath. Aliens may be required to serve in our armed forces; their taking of a loyalty oath is deemed sufficient to allow them to serve and fight for the United States. The same oath would suffice here. Taggart v. Mandel, supra, n. 28, 391 F. Supp. at 740; cf. In Re Griffiths, supra, 413 U.S. at 725-26 and n. 18 (attorneys' professional standards of practice, enforced by disciplinary rules and official reviews of conduct, obviate need for citizenship requirement to assure proper discharge of lawyers' responsiblity).

CONCLUSION

New York Executive Law § 215(3) discriminates against permanent resident aliens in violation of their right to equal protection of the laws. It cannot be justified under controlling constitutional standards. Its enforcement should therefore be enjoined.

This Court should reverse the judgment of the three-judge court below.

Respectfully submitted,

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